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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 729

FRED THIELE AND EUGENE PANGER, CO-PARTNERS, D/B/A TWIN TOWERS COMMISSARY,

Respondents,

vs.

CITY OF CHICAGO, A MUNICIPAL CORPORATION, AND MARTIN H. KENNELLY, MAYOR OF THE CITY OF CHICAGO; TIMOTHY J. O'CONNOR, COMMISSIONER OF POLICE OF THE CITY OF CHICAGO; AND ROY T. CHRISTIANSEN, COMMISSIONER OF BUILDINGS OF THE CITY OF CHICAGO,

Petitioners.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

Preliminary Statement.

In their brief in opposition, respondents have elected to ignore a basic issue in the case at bar which presents a novel point of law. That point is the lease provisions which compel compliance with local laws and which requires the respondents to indemnify the United States from actions for nonobservance of such local laws. None of the cited cases hinged on this issue and the matter, is therefore, undecided by this Court. No authority relied

upon by respondents, nor, indeed, by petitioners, settles this issue. It is, then, imperative, that this Court resolve the issue lest the decision of the court below be regarded throughout the nation as settled law. It is true, as respondents point out, that the court below held such provisions of the lease to be unenforceable. It is for that very reason we ask this Court to grant certiorari.

The other basic issue is whether the power of "local taxation" provided for in Section 6 of the Military Leasing Act of 1947 (10 U. S. C. Section 1270d) includes the power of a municipality to tax and regulate a private business having a direct relationship to the public health, safety and welfare. Strangely, respondents have failed to discuss this basic issue.

Reply to Point I of Respondents' Argument.

Respondents here argue that the decision of the court below is based upon "familiar principles of constitutional law" (Brief in Opposition, pp. 4-7). We have already pointed out the unique aspects of the case at bar. Respondents' efforts to liken the facts in the case at bar to those in *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, have no success because there is no similarity.

Respondents challenge our statement that the United States leased *all* of its land to them because other governmental property was "adjacent" to the land in question. Adjacent, yes, but not contiguous. The Government has many properties in the City of Chicago, some in the vicinity of respondents' building. The basic fact remains, however, that this particular land was leased in its entirety to Greenwald.

Respondents contend that the United States is "actively in charge" of the premises because "A number of provisions in the * * * lease reserve to Army authorities

wide areas of supervision, inspection and control" (Brief in Opposition, p. 5) referring this Court to pp. 10, 11 of the Additional Abstract as grounds therefor. The provisions of the lease to which respondents refer merely state that "for safety and security purposes" the use and occupation of the premises shall be subject to rules and regulations prescribed by the Commanding Officer; and that *after* the premises are not under the control of the Federal Housing Commissioner and *after* there is no Federal Housing Administration mortgage on the property, then the lessee shall adhere to *such standards of maintenance and repair* of the Housing Project *as shall be mutually agreed upon* between the lessee and the Commanding Officer. These provisions of the lease certainly do not protect the general public from improper health safeguards in the operation of a commissary.

Respondents argue that we have charged them with a determination to "foster and perpetuate conditions of filth and contamination" (Brief in Opposition, p. 6). We have never so charged. We have, however, pointed out that this is possible. If we were to rely upon the good faith and honor of every food purveyor, there would be no need for regulation in this regard. It is the unintended violation of health regulations that we fear. Through ignorance, and sometimes by intent, safety regulations are disobeyed. By inspection and regulation, we protect the public from danger. Furthermore, the record is clear (Abst. 18) that people from the neighborhood, not living in the Twin Towers and not Army personnel, are permitted to buy food in the Commissary. It is therefore apparent the City has a vital interest in the manner which the Commissary is operated.

Respondents contend that the ordinances in question do not pertain to them because the lease refers to "applicable" ordinances (Brief in Opposition, p. 6, 7). We must

confess we are baffled by this statement. Ordinances governing food purveyors are "applicable" if we are dealing with food purveyors, as in the case at bar. An ordinance relating to taverns, beauty shops, or tailor shops would not be "applicable." Respondents argue that the ordinance is not applicable because the City of Chicago has no jurisdiction over the land. We cannot follow this reasoning. In such case the lease provisions would be meaningless. No ordinance, of any kind whatsoever, would be "applicable," so that there would be no necessity of such language in the lease. The fact remains, and respondents cannot overcome it, that the lease does provide that respondents will comply with local laws and that they will hold the United States harmless from actions brought for non-observance of such local laws. This is irrefutable and respondents cannot dodge the issue by contending the ordinance in question is not "applicable."

Reply to Point II of Respondents' Argument.

Respondents here attempt to answer cases cited by us in our Petition. We do not believe this is the place to analyze authorities.

However, under their first point of argument respondents argue that the cases there set out involve partial retrocession of jurisdiction by Congress. They include in such cases *Offutt Housing Company* v. *Sarpy County*, 351 U. S. 253, which the court below held involved a lease similar to that in the case at bar (Petition, p. 18). The *Offutt* lease is strikingly similar to the lease in the case at bar and this Court there held local authorities could tax the lessee's interest even though on Federal land. Respondents conclude (Brief in Opposition, p. 8) that local governments have no right to license activities on land subject to exclusive federal jurisdiction. Respondents are usurping

the function of this Court in so deciding because that is the issue. The lease provides that respondents *must* obtain a license.

Under their second point of argument, respondents contend that cases there discussed involved situations where the Federal function "was not unduly hampered by the imposition of * * * local * * * regulation" (Brief in Opposition, p. 8). We challenge respondents to show anywhere in the record where the licensing provisions here involved would "hamper" any federal function. Respondents have never argued that it would. The facts show that it would not interfere in any way. Respondents continue to mislead this Court by arguing (Brief in Opposition, pp. 8, 9):

> "* * * the proposed enforcement of the local ordinances would effectively deprive the Federal Government of a facility which it specifically requires * * *."

The foregoing is an unbelievable statement. It can only mean that if health inspections disclose a dangerous health menace to persons dealing with respondents' commissary (including the Military), and if a license is therefore denied or withheld until the conditions are corrected, then the Federal Government is being "deprived" of a needed facility. Such a deprivation would only be in the best interests of the United States Government and its personnel.

Lastly, respondents argue that local laws prevailing at the time of cession of jurisdiction by a state to the Federal Government survive after cession, *unless or until they come into conflict with federal laws* (Brief in Opposition, p. 9). We accept this. But we again challenge respondents to show from this record where any conflict has been proven with federal laws. There is no conflict and, therefore, from respondents' own argument, local laws are applicable to the commissary in question.

Conclusion.

This case involves basic issues which have not been determined by this Court.

With the widespread application of the provisions of the Military Leasing Act of 1947 and Wherry Housing Act of 1949 within the boundaries of municipalities throughout the country it is of vital importance that this Court decide the issues presented in our petition.

This is especially true where the doctrine of governmental immunity is not asserted by the Government, but rather by private individuals who own and operate a commissary for personal profit.

WHEREFORE, it is respectfully prayed that the petition for writ of certiorari be granted.

Respectfully submitted,

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